

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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SUSAN McCLEMENT,

Plaintiff,

v.

Civil Action No.  
1:13-CV-1450 (DEP)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

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APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

BUCKLEY, MENDLESON LAW OFFICE    IRA MENDLESON, III, ESQ.  
29 Wards Lane  
Albany, NY 12204

FOR DEFENDANT

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Special Assistant U.S. Attorney

DAVID E. PEEBLES  
U.S. MAGISTRATE JUDGE

## ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Commissioner, pursuant to 42 U.S.C. § 405(g), are cross-motions for judgment on the pleadings.<sup>1</sup> Oral argument was conducted in connection with those motions on February 13, 2015 during a telephone conference, held on the record. At the close of argument I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination did not result from the application of proper legal principles and is not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, a transcript of which is attached and incorporated herein by reference, it is hereby

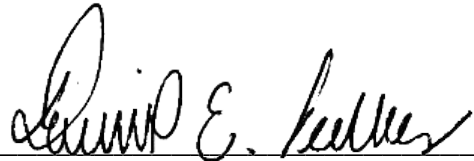
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<sup>1</sup> This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18 (formerly, General Order No. 43) which was issued by the Hon. Ralph W. Smith, Jr., Chief United States Magistrate Judge, on January 28, 1998, and subsequently amended and reissued by Chief District Judge Frederick J. Scullin, Jr., on September 12, 2003. Under that General Order an action such as this is considered procedurally, once issue has been joined, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

ORDERED, as follows:

- 1) Plaintiff's motion for judgment on the pleadings is GRANTED.
- 2) The Commissioner's determination that plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is VACATED.
- 3) The matter is hereby REMANDED to the Commissioner, with a directed finding of disability, for the purpose of calculating benefits owing to the plaintiff.
- 4) The clerk is directed to enter judgment, based upon this determination, remanding the matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.

Dated: February 13, 2015  
Syracuse, New York

  
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David E. Peebles  
U.S. Magistrate Judge

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----x  
SUSAN McCLEMENT,

Plaintiff,

vs.

1:13-CV-1450

COMMISSIONER OF SOCIAL SECURITY,

Defendant.  
-----x

Transcript of a Telephone Conference Decision  
held on February 13, 2015, at the James Hanley  
Federal Building, 100 South Clinton Street,  
Syracuse, New York, the HONORABLE DAVID E. PEEBLES,  
United States District Judge, Presiding.

A P P E A R A N C E S

(Via Telephone)

For Plaintiff: BUCKLEY, MENDLESON LAW FIRM  
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BY: IRA MENDLESON, III, ESQ.

For Defendant: SOCIAL SECURITY ADMINISTRATION  
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1                   (The following is an excerpt from the  
2                   proceedings held on 2/13/15.)

3                   (In Chambers, Counsel present via telephone.)

4                   THE COURT: Very good. I appreciate excellent  
5                   presentations by counsel.

6                   I have before me a request for judicial review of a  
7                   Commissioner's determination that the plaintiff in this  
8                   action was not disabled at the relevant times and therefore  
9                   ineligible for the benefits for which she applied. Review is  
10                  sought under 42 United States Code Section 405(g).

11                  As everyone knows, under that provision, the  
12                  court's task is fairly limited and it applies a very  
13                  deferential standard. My role is to determine whether proper  
14                  legal principles were applied and the ALJ and Commissioner's  
15                  determination were supported by substantial evidence. The  
16                  Supreme Court has defined substantial evidence as such  
17                  relevant evidence as a reasonable mind might accept as  
18                  adequate to support a conclusion.

19                  The background for the case is as follows: The  
20                  plaintiff was born in January of 1975 and is 40 years old.  
21                  She's a high school graduate with some trade school training.  
22                  She's right-hand dominant, she's divorced, last worked in  
23                  July of 2009, where she was injured in a submarine shop  
24                  setting. She's also worked as a certified nurse aide in a  
25                  nursing home, as a cashier in a grocery and drugstore, and as

1 a bank teller.

2 In July of 2009, she consulted with an orthopedist,  
3 Dr. Todd Shatynski, who saw her from then until roughly  
4 January of 2010. She has also treated with Latham Medical  
5 Group including Drs. Locke and Yoon who appear to be general  
6 practitioners.

7 In February of 2010, she saw Dr. Daniel T. Phelan,  
8 an orthopedic surgeon, who performed a SLAP repair of the  
9 plaintiff's left extremity on July 28, 2010. After the  
10 surgery the plaintiff continued to complain of pain in her  
11 left shoulder. She went to physical therapy between  
12 September and November of 2010. She was ultimately seen by  
13 Dr. Kyle Flik for a second opinion on May 25, 2011. Dr. Flik  
14 diagnosed her with suspected bicipital tendinitis and gave  
15 her a Lidocaine injection. Didn't appear to question  
16 plaintiff's complaints of pain. His reports include page 259  
17 of the administrative transcript. He indicated he doubted  
18 the plaintiff would ever improve.

19 She has seen several Workers' Compensation  
20 consultants, including Dr. Steven Hausmann, in 2010 diagnosed  
21 plaintiff with adhesive capsulitis, indicated she had a  
22 limited range of motion and no ability to lift with her left  
23 extremity.

24 She was also consultatively seen by Dr. Louis  
25 Benton in the Workers' Compensation setting on November 14th,

1 2011, and again, September 8, 2012.

2 She was seen on behalf of the Commissioner, as  
3 plaintiff's counsel indicated, by Dr. Jose Corvalan on  
4 January 19, 2012. He issued a medical source evaluation and  
5 that is in the record.

6 She was seen on September 24, 2012 by Dr. Andrew  
7 Dubin on referral from Dr. Phelan. He indicated that  
8 plaintiff had a marked partial disability.

9 Plaintiff underwent a second surgery on April 24,  
10 2012.

11 Procedurally, plaintiff applied for Disability  
12 Insurance benefits on November 1, 2010, alleging an onset  
13 date of July 2, 2009. Hearings were conducted on May 8, 2012  
14 and December 15, 2011 by Administrative Law Judge Carl  
15 Stephan.

16 On May 18, 2012, ALJ Stephan issued a decision.  
17 The decision became a final determination of the Commissioner  
18 on October 1, 2013 when the Social Security Administration  
19 Appeals Council denied plaintiff's application for review of  
20 that determination.

21 In his decision, the administrative law judge went  
22 through the now familiar five-step test for determining  
23 disability, found that the plaintiff was insured through  
24 December 31, 2014, at step one concluded she had not engaged  
25 in substantial gainful activity since July 2, 2009, noted

1 that she suffers from severe -- at step two, severe  
2 conditions posing work-related limitations including left  
3 shoulder pain post-arthroscopic surgery and asthma. At step  
4 three he concluded, however, that she did not -- her  
5 conditions did not meet or equal medically any of the listed  
6 presumptively disabling conditions. He considered both the  
7 musculoskeletal issues and her respiratory issues under  
8 Listings 1.00 and 3.00.

9 He next determined, after surveying the medical  
10 evidence, that she retains the residual functional capacity  
11 to work in a sedentary setting, except that she's limited to  
12 lifting and/or carrying 5 pounds occasionally and  
13 occasionally reaching in all directions with her nondominant  
14 left upper extremity but she has no restrictions with her  
15 dominant right upper extremity. In addition, she has no  
16 ability -- no sit, stand, or walk limitations but cannot  
17 perform any climbing of ladders or scaffolds and no crawling.  
18 He further found she should not be exposed to concentrated  
19 amounts of respiratory irritants.

20 Applying that RFC, he next presented or --  
21 presented a hypothetical, two hypothetical questions, one of  
22 which tracked his RFC finding, to a vocational expert, who  
23 concluded and testified that plaintiff cannot perform her  
24 past relevant work, and that she is unable to perform in  
25 other capacities -- that she is able to perform, I'm sorry,



1 work available in the national and regional economies.

2 The second hypothetical which was far more  
3 restricted, as plaintiff's counsel indicated, resulted in a  
4 finding that plaintiff was not disabled. The ALJ also noted  
5 that if the grids were applied, a finding of no disability  
6 would be compelled by Rule 202.21, but he determined that  
7 with her nonexertional limitations, a vocational expert  
8 should be -- should testify based on the possibility of  
9 erosion of the job base on which the grids are predicated.

10 When I look at the medical evidence, I have to  
11 conclude that the finding that plaintiff can occasionally  
12 lift with her left extremity is not supported by substantial  
13 evidence. It is certainly contradicted by plaintiff's  
14 testimony. At pages 38 and 50, she testified she is unable  
15 to use her left arm. Dr. Hausmann indicated that she is  
16 unable to lift above her waist with her left arm at 223 of  
17 the administrative transcript. Dr. Benton said that she is  
18 able to work but cannot use her left extremity, left upper  
19 extremity for any meaningful work, that is at 276. I note  
20 that the administrative law judge claimed to have given great  
21 weight to the opinions of Dr. Benton. Dr. Corvalan also  
22 indicated that plaintiff has a marked limitation in her use  
23 of her left upper extremity, that is at 280. The  
24 administrative law judge claims to have given at least some  
25 weight to Dr. Corvalan's opinions.

1           When the ALJ balanced the medical evidence, he  
2           focused on Dr. Locke and Dr. Yoon, these are generalists who  
3           were treating the plaintiff primarily prior to her even first  
4           surgery; Dr. Shatynski, who treated the plaintiff early on;  
5           and Dr. Flik, who saw her only once and even then found no  
6           reason to question her pain and gave her a Lidocaine  
7           injection.

8           Her treating source unfortunately has really not  
9           provided a medical source statement. Dr. Phelan did,  
10          however, say that she was 100 percent disabled, and while it  
11          is certainly the law that his, his raw conclusion of  
12          disability is not acceptable and entitled to controlling  
13          weight since it addresses a matter reserved to the  
14          Commissioner, nonetheless, it certainly is an indication that  
15          Dr. Phelan concurs with these other opinions about her  
16          limitations.

17          So I conclude that the vocational expert's  
18          testimony based on residual function -- the first  
19          hypothetical that tracks the residual functional capacity is  
20          flawed because the residual functional capacity is not  
21          supported by substantial evidence. And were it not for the  
22          second hypothetical, I would remand the matter with a  
23          direction that the matter be reconsidered. However, I agree  
24          with the plaintiff that the second hypothetical does track  
25          the medical evidence and is supported and because the

1 vocational expert testified that given the limitations of the  
2 second hypothetical, plaintiff is unable to work in any  
3 capacity in any job available in the national and local  
4 economy, I conclude that there is persuasive proof of  
5 disability and I will therefore vacate the Commissioner's  
6 determination and remand with a directed finding of  
7 disability solely for purposes of calculating benefits.

8 I thank you both for your excellent presentations  
9 again and I hope you have a great weekend.

10 MR. MENDLESON: Okay, thank you, your Honor.

11 THE COURT: Thank you.

12 (Proceedings Concluded, 10:28 a.m.)  
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CERTIFICATE OF OFFICIAL REPORTER

I, JODI L. HIBBARD, RPR, CRR, CSR, Federal  
Official Realtime Court Reporter, in and for the  
United States District Court for the Northern  
District of New York, DO HEREBY CERTIFY that  
pursuant to Section 753, Title 28, United States  
Code, that the foregoing is a true and correct  
transcript of the stenographically reported  
proceedings held in the above-entitled matter and  
that the transcript page format is in conformance  
with the regulations of the Judicial Conference of  
the United States.

Dated this 13th day of February, 2015.

/S/ JODI L. HIBBARD  
JODI L. HIBBARD, RPR, CRR, CSR  
Official U.S. Court Reporter